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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-jmp

4 Adv. Case No. 08-01420-jmp

5 - x

6 In re

7 LEHMAN BROTHERS HOLDINGS INC., et al.,

8 Debtors.

9 - x

10 In re

11 v.

12 LEHMAN BROTHERS INC.,

13 Defendant.

14 - x

15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 May 16, 2012

20 10:02 AM

21

22 B E F O R E :

23 HON JAMES M. PECK

24 U.S. BANKRUPTCY JUDGE

25

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1 Hearing re: Motion of Edward J. Agostini, et al. for Relief  
2 from the Automatic Stay [ECF No. 24769]

3

4 Hearing re: Williams-Pate v. Lehman Brothers Holdings Inc.  
5 [Adversary Proceeding No. 12-01220]

6

7 Hearing re: Motion of Fidelity National Title Insurance  
8 Company to Compel Compliance with Requirements of Title  
9 Insurance Policies [ECF No. 11513]

10

11 Hearing re: Motion of Monti Family Holding Company, Ltd.  
12 for Leave to Conduct rule 2004 Discovery of Debtor Lehman  
13 Brothers Holdings, Inc. and Other Entities [ECF No. 16803]

14

15 Hearing re: Amended Motion of Ironbridge Homes, LLC, et al.  
16 for Relief from the Automatic Stay [ECF No. 23551]

17

18 Hearing re: Motion of Grace Farrelly Pursuant to §§ 105 and  
19 362 for Relief from Automatic Stay [ECF No. 25205]

20

21 Hearing re: Motion of Giants Stadium LLC for Leave to  
22 Conduct Discovery of the Debtors Pursuant to Federal Rule of  
23 Bankruptcy Procedures 2004 [ECF No. 16016]

24

25 Hearing re: Bank of Montreal's Responses and Objections to

Page 3

1 Subpoena of Debtors and Debtors in Possession Pursuant to  
2 Rules 2004 and 9016 of the Federal Rules of Bankruptcy  
3 Procedure [ECF No. 24847]

4

5 Hearing re: Cardinal Investment Sub I, L.P. and Oak Hill  
6 Strategic Partners, L.P.'s Motion for Limited Intervention  
7 in the Contested Matter Concerning the Trustee's  
8 Determination of Certain Claims of Lehman Brothers Holdings  
9 Inc. and Certain of Its Affiliates [LBI ECF No. 4634]

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11 Hearing re: Motion of Clear Vue Opportunity XVIII, LLC for  
12 Relief from the Automatic Stay [ECF No. 27287]

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25 Transcribed by: Louise Zontek

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15 BY: CRAIG J. ALBERT, SQ.

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1 P R O C E E D I N G S

2 THE COURT: Be seated. Well, considering this is  
3 a Lehman omnibus day and there's a handful of people here it  
4 suggests the case has progressed to a new -- a new stage of  
5 relative peace.

6 MS. MARCUS: Good morning Your Honor, Jacqueline  
7 Marcus of Weil, Gotshal & Manges for the Lehman debtors.

8 We're here, Your Honor, for a very brief agenda.  
9 As you've noted, we only have one matter on the agenda, it  
10 is a contested matter, the motion of Edward J. Agostini for  
11 relief from the automatic stay, and Mr. Albert is here on  
12 behalf of the movant.

13 THE COURT: Okay.

14 MR. ALBERT: Thank you, Your Honor, good morning.  
15 I'm Craig Albert of Reitler, Kailas and Rosenblatt for the  
16 Agostini parties.

17 Your Honor, the Agostini parties were party to a  
18 forward derivative contract with Lehman OTC Derivatives, as  
19 known in these proceedings LOTC. And having had their  
20 claims -- having had their claims adjourned CINA D (ph) and  
21 having had no response from Lehman with respect to how its  
22 collateral -- their collateral -- was going to be returned  
23 to them, they made this -- we need this motion in order to  
24 require the turnover of 50,000 shares that the Agostini  
25 parties own that is --

1 THE COURT: But you can't do that by motion.

2 MR. ALBERT: Well, we did -- what we did was we  
3 moved for relief from the automatic stay, and Your Honor,  
4 the initial --

5 THE COURT: I can't grant you (indiscernible -  
6 00:01:50) relief with respect to your turnover claim.

7 MR. ALBERT: Yes, and I will recognize, Your  
8 Honor, that we need first relief from the automatic stay in  
9 order to proceed.

10 THE COURT: But isn't this a futile activity?  
11 Because as I read the papers filed in opposition, even if  
12 you were to have stay relief, and even if you were to  
13 commence the litigation, the defense would be, sorry, we  
14 don't have the property in question. It's at LBI.

15 MR. ALBERT: Your Honor, the first time that LOTC  
16 revealed in any filing that these securities were not in his  
17 possession, or in its opposition papers that were filed last  
18 week. That is when --

19 THE COURT: Okay. Well, now that you know it why  
20 are we here?

21 MR. ALBERT: Well, because -- because the -- there  
22 are two different -- there are two different things that can  
23 happen here.

24 First of all, we can obviously make the motion for  
25 relief and seek the -- and seek the same relief as against

1 the SIPA trustee, but we would contend that even with  
2 respect to this property, it being conceded by LOTC, that  
3 this is non-estate property, both the shares and the  
4 accumulated dividends on the shares.

5 The fact that they are sitting in a LOTC  
6 controlled account with LBI in the SIPA proceedings does not  
7 divest those shares of their quality of being both non-  
8 estate property, either in this proceeding or in the SIPA  
9 proceeding, and certainly not the property of LOTC.

10 But what LOTC revealed in its opposition papers  
11 last week was that it had filed its own claim in the SIPA  
12 proceeding claiming that these shares -- and presumably the  
13 dividends thereon -- were its property, and the purpose and  
14 effect of that -- of that -- that arrangement is to attempt  
15 to convert the Agostini's claim to return of their shares  
16 into -- from what it actually is, which is their entitlement  
17 to the 50,000 shares plus the dividends thereon, which --

18 THE COURT: Have the Agostini's made a claim in  
19 the LBI case for this property?

20 MR. ALBERT: Not at all. The Agostini's are  
21 strangers to LBI. The Agostini's do not have an -- do not  
22 have an account with LBI. And the proof of that is in the  
23 fact that LOTC made the -- made the filing with respect to  
24 that claim.

25 THE COURT: Well, that doesn't really prove very

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1 much in my experience, because the way this case has shown  
2 itself to me is that multiple parties will make claims for  
3 the same property, and in the LBI case in particular, there  
4 are very significant issues before the Court, and then get  
5 resolved, concerning claims by Lehman affiliates against LBI  
6 for customer status or for the recovery of property.  
7 Sometimes such claims being brought on behalf of customers,  
8 sometimes such claims being brought as proprietary claims.

9 So the conclusory statements that you're making do  
10 not necessarily prove anything.

11 MR. ALBERT: Okay. But what is -- what is true,  
12 Your Honor, is that until the opposition papers were filed  
13 last week the Agostini parties had no idea that their  
14 securities were deposited in any way with LBI, so they would  
15 not have had a basis on which to file a claim against LBI.  
16 To file the claim against LOTC, of course they did that, and  
17 there's been no hearing on that claim, and that's been  
18 adjourned CINA D. To file a claim against LBHI, certainly,  
19 they were guarantor, but against LBI, no.

20 But the point that the Court has raised with  
21 respect to customer claims versus proprietary Lehman claims  
22 I believe is an important one, because the -- because in the  
23 SIPA proceeding the Lehman parties purport to be entering  
24 into -- and in fact have announced -- that they have some  
25 sort of settlement in principle with the SIPA trustee --

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1 with the SIPA trustee with respect to all of the Chapter 11  
2 debtors. But not for want of trying I have had no  
3 revelation as to how they intend to deal with the issue of  
4 the Agostini's owned claims.

5 Now, the purpose of the ultimate resolution were  
6 the property rights and the non-estate character of these  
7 shares to be respected, whether in the LOTC proceeding or in  
8 the SIPA proceeding would be this, that the 50,000 shares  
9 plus the accumulated dividends in the SIPA proceeding as  
10 non-estate property, and which are not -- which are not  
11 being used in -- in that proceeding -- I'm sorry, in that  
12 estate -- would be turned over to the Agostinis, and then  
13 LOTC, which is the Agostini's part -- the Agostini's  
14 counter-party on the forward derivative contracts, LOTC  
15 would have a claim against the Agostini parties for a return  
16 of either certain of those shares, approximately 46,500 of  
17 them, less the value of the dividends, or would have a claim  
18 for the value of those shares, or we would engage in a  
19 simple negotiation as to what the closeout of the forward  
20 derivative contract amount should be.

21 And that is what -- that is simply what would  
22 happen, because as Lehman -- as LOTC concedes on this  
23 motion, this property, these shares, are not part of the  
24 estate. It is collateral that we pledged, and then in May  
25 of 2011, once the time for performance came due, it was to

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1 be returned to us.

2 And so as a rather simple matter, if anyone were  
3 to create -- to have to -- have to commence an adversary  
4 proceeding here, the person who would have to commence an  
5 adversary proceeding would be Lehman against the Agostinis  
6 in order for them to receive their portion back of the  
7 50,000 shares that they were owed on the forward contract.

8 THE COURT: I hear what you said, but it's not  
9 making sense to me, and I'll tell you why.

10 MR. ALBERT: Okay.

11 THE COURT: This is not a shell game, but it could  
12 be compared to that in this respect.

13 My understanding is that under this forward  
14 contract arrangement, and there doesn't seem to be much  
15 dispute that such a contract existed, the shares in question  
16 are not currently held by the party you are now seeking to  
17 sue. So they argue in response, you're not entitled to stay  
18 relief because there is no property of the estate as to  
19 which the stay applies.

20 So even if you were to get stay of relief, that  
21 wouldn't do anything for you in terms of pursuing the  
22 adversary proceeding that you first started with as opposed  
23 to the one that you ended with, because if you ended with an  
24 adversary proceeding in which somehow you're holding the  
25 shares and they're trying to get the shares back from you.

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1           Apparently the fact of the matter is -- and I  
2       don't have evidence to guide me on this, I'm simply take the  
3       debtors' papers at face value -- the shares in question  
4       reside at LBI. If that's where the shares are we're wasting  
5       our time today and you probably would be wasting your time  
6       in commencing litigation within the Chapter 11 case.

7           Now, I have the advantage of being the presiding  
8       judge in both cases, and as a result, I have information  
9       concerning both cases. Much of it is publicly available  
10      information; however, a lot resides between my ears, and for  
11      that reason I am aware that there is currently going on a  
12      major allocations dispute in the LBI case concerning the  
13      making of an interim distribution to customers.

14           In the context of public hearings that have taking  
15      place in this courtroom with respect to the allocation  
16      motion, which is contested, I have learned that there are  
17      significant problems in dealing with the property of the LBI  
18      estate for the benefit of LBI's customers, including LBI's  
19      affiliates.

20           So, you are not alone in being an indirectly,  
21      adversely affected party to the delay associated with the  
22      return of customer property and the making of interim  
23      distributions arising out of the LBI SIPA case.

24           I understand what you're saying, that your client  
25      did not have, based upon your representations, direct

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1 privity with LBI or an LBI customer account, but how does  
2 that change the facts as to where the property actually  
3 resides?

4 MR. ALBERT: It doesn't change where the property  
5 resides, Your Honor, but it certainly -- it certainly does  
6 -- it also does not change the fact that LOTC has -- LOTC is  
7 -- claims to be, and in fact as -- as between -- as its  
8 relation -- in its capacity as an internal customer of LBI  
9 is in possession or constructive possession of the Agostini  
10 shares in that LBI account. And to that extent, they are --  
11 I do not believe that they are free to deal with that  
12 property as though it were their own.

13 If the procedural problem here is that we've now  
14 -- it's now been revealed to us that the shares that  
15 everyone agrees is non-estate property have been sitting in  
16 an account at LBI and that the Agostinis have an interest in  
17 that property, then I would agree fully that the -- that the  
18 proper procedure now is to make a similar motion in the SIPA  
19 case and ask for a turnover -- turnover of that and perhaps  
20 to ask for interim relief as well, that is in the way of a  
21 stay, to forbid them -- to forbid LOTC and LBI from  
22 disposing of those 50,000 shares and the -- and the  
23 dividends thereon as part of a global settlement or it could  
24 be taken care of in the form of an objection to any motion  
25 to approve the settlement. I concede that readily.

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1           THE COURT: Okay. Well, I can't tell you how to  
2 proceed at this point, but I suspect if you were to bring a  
3 motion in the SIPA case you'll be potentially met with the  
4 argument that you lack customer standing, because you've  
5 already told me that from the perspective of the Agostinis  
6 they didn't deal with LBI and they didn't have an LBI  
7 account.

8           So, not to use a play on words, you might have a  
9 derivative claim with respect to Lehman Brothers' OTC  
10 derivatives claim in the LBI case, but -- and I don't mean  
11 to suggest that there are other ways to do this -- it seems  
12 to me that for purposes of today's motion practice we have  
13 something of an impossibility problem in that the debtors  
14 have defended your motion on the basis that we don't have  
15 property in the estate in question and so stay relief is not  
16 appropriate.

17           But more to the point, even if we were to grant  
18 you stay relief and you were to proceed with litigation  
19 here, that litigation -- assuming the facts pled are true --  
20 would be futile. So that wouldn't be a particularly good  
21 use of either your time or my time.

22           So, it seems to me that the better way for parties  
23 to spend their time -- and I can't imagine that this hasn't  
24 already happened to some extent -- would be to talk about  
25 ways to deal with this as a business proposition such that

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1 the Agostini's claims could be recognized and respected,  
2 assuming Lehman Brothers' OTC Derivatives were prepared to  
3 do that.

4 MR. ALBERT: We have made that effort.

5 THE COURT: And instead of litigating, once the  
6 property in question is released -- assuming it's actually  
7 there -- the parties can then close out this trade.

8 MR. ALBERT: The -- the discussion -- there have  
9 not been fruitful discussions on the question, but with Your  
10 Honor's admonition I would hope that the Agostinis, the  
11 Lehman parties, and the SIPA trustee could, in fact, have  
12 that discussion.

13 THE COURT: Well, let's find out if that's  
14 realistic. And I don't -- I've been characterizing the  
15 Lehman position, but we haven't heard the Lehman position.  
16 So let's find out what Lehman thinks about all this.

17 MR. ALBERT: Thank you, Your Honor.

18 MS. MARCUS: Thank you, Your Honor. Jacqueline  
19 Marcus again on behalf of Lehman.

20 I won't do the presentation that I had planned,  
21 because I think Your Honor touched on most of the issues  
22 that I was going to address, but I did want to address some  
23 of the issues that both Your Honor raised, and Mr. Albert  
24 raised.

25 First the concept that the shares are sitting in

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1       LOTC controlled account -- I think those were the words that  
2       Mr. Albert used -- and this idea of constructive possession.  
3       As Your Honor is well aware, LOTC has no control over  
4       anything that LBI is doing at the moment, and while we'd  
5       love to get the shares out of that account, we don't have  
6       the ability to do that.

7               So in terms of if there is a concept of  
8       constructive possession that might apply it doesn't apply  
9       here, because we have neither custody nor control of that  
10      account.

11              Second, with respect to whether this is estate  
12       property or not estate property, we do concede that there is  
13       a substantial portion of the shares that do belong to the  
14       Agostini trust, if we get them back. There's a question as  
15       to valuation, because with forward contract worked there was  
16       an allocation depending on the value of the shares.

17              So the exact numbers, there may be a dispute on as  
18       to the numbers that are cited in the Agostini motion, and  
19       that is an area where I think we are prepared to negotiate  
20       in terms of what the appropriate allocation of those shares  
21       should be. I don't think there's really any room for us to  
22       negotiate on actually turning over the shares, because as  
23       Your Honor noted, we don't have them.

24              Third, the concept that by filing the customer  
25       claim in the LBI case LOTC was attempting to convert or

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1 assert that it owns the shares over the claims of the  
2 Agostini I think is, I'll call it an exaggeration. We  
3 believe we did the right thing in protecting the Agostinis  
4 as well as LOTC in asserting that claim, because had we not  
5 asserted the claim we wouldn't be able to get the shares  
6 back.

7 So we were asserting that claim on behalf of both  
8 ourselves and the Agostinis in order to get those shares  
9 back, and this is not an attempt to do an end run or somehow  
10 convert property that doesn't belong to LOTC.

11 THE COURT: Can I just -- can I just ask for a  
12 clarification?

13 The claim that LOTC has asserted in the LBI estate  
14 I assume is not simply in relation to any rights of the  
15 Agostinis in connection with this trade, but in connection  
16 with a variety of other trades between LOTC and  
17 counterparties that might have an interest in shares, or is  
18 this in fact the only -- the only aspect of the LOTC claim  
19 in the Libby (ph) case?

20 MS. MARCUS: I think it's the only -- and I  
21 apologize, I'm not that familiar with the claims -- I  
22 believe that there were multiple claims filed, and I don't  
23 know if LOTC has more than one, but I believe as to UPS  
24 Class D shares this is the only claimant.

25 THE COURT: Okay. So to the extent that there was

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1 a claim made in the name of LOTC as customer in the LBI  
2 case, in relation to these particular shares, that claim was  
3 made for the Agostini's benefit and for the benefit of LOTC  
4 to the extent that there was any residual value in the trade  
5 for LOTC to retain.

6 MS. MARCUS: That's correct.

7 THE COURT: Did I get that correctly?

8 MS. MARCUS: Yes, exactly.

9 THE COURT: Okay.

10 MS. MARCUS: I ask finally, Your Honor, to the  
11 point about the Agostini parties not knowing until the  
12 objection was filed last week that the shares were in the  
13 LBI account. After the motion was filed we did contact  
14 counsel for the Agostinis and we told them that the shares  
15 were in the account, and we also provided them with account  
16 statements showing that the shares were in the account.

17 So perhaps we could have avoided today's hearing,  
18 but it didn't turn out that way.

19 I think that's all I have, Your Honor. We can get  
20 into the standards for relief from the automatic stay, but  
21 as Your Honor pointed out, if they got relief from the  
22 automatic stay today it would be a futile effort, so I don't  
23 think it's worth going through those argument.

24 THE COURT: I don't think we need to go into the  
25 Sonnax standards for this.

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1           But we have a practical problem here. I mean  
2 there are multiple ways I could dispose of this motion. It  
3 may be that the best way would be for the motion to be  
4 withdrawn without prejudice frankly, if counsel for the  
5 Agostinis were prepared to do that, because I think its  
6 probably already fulfilled its principal purpose, which is  
7 to gain what amounts to some discovery concerning the actual  
8 position of LOTC with respect to the shares and to initiate  
9 a dialogue, hopefully one of them will be reasonably  
10 productive, about settling the then amounts due in a  
11 connection with the forward contract, and I don't know to  
12 what extent counsel for the LBI trustee would need to be  
13 involved in these conversations, but some informal dialogue  
14 probably is the best way to go here.

15           So, I could either deny the motion without  
16 prejudice or it could be withdrawn without prejudice, but I  
17 am certainly loathe to grant it at this point, given the  
18 circumstances that have been alleged. Because all that  
19 would do would be to prompt unproductive litigation.

20           MR. ALBERT: Thank you, Your Honor. With that in  
21 mind, Craig Albert for the Agostinis, I would like to  
22 withdraw my motion with prejudice and hopefully be able to  
23 engage --

24           THE COURT: With or without prejudice?

25           MR. ALBERT: I'm sorry, without prejudice, I

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1 apologize.

2 THE COURT: I figured without prejudice is what  
3 you meant.

4 MR. ALBERT: Yes, without prejudice. And I would  
5 -- hopefully I will be able to engage in a dialogue with the  
6 representatives of LOTC and the LBI trustee.

7 THE COURT: Okay, that's fine.

8 MR. ALBERT: Thank you, Your Honor.

9 THE COURT: And that's the end of the morning  
10 calendar, correct?

11 MS. MARCUS: That is, Your Honor.

12 THE COURT: Okay. We'll be back at 2 o'clock.

13 MS. MARCUS: Thank you.

14 THE COURT: Thank you.

15 (Whereupon these proceedings were concluded at 10:26  
16 AM)

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1                   C E R T I F I C A T I O N

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3       I, Louise Zontek, certify that the foregoing transcript is a  
4       true and accurate record of the proceedings.

5

6       Louise Zontek   
7                   Digitally signed by Louise Zontek  
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